

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARQUAVIS DAWAUNE JONES,

Defendant-Appellant.

UNPUBLISHED

November 17, 2005

No. 255085

Genesee Circuit Court

LC No. 03-013265-FH

Before: Jansen, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession of less than fifty grams of cocaine with the intent to deliver, MCL 333.7401(2)(a)(iv), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). Defendant was sentenced to 18 to 240 months' imprisonment for the possession with intent to deliver cocaine conviction and 18 to 48 months' imprisonment for the possession with intent to deliver marijuana conviction. We affirm.

Defendant's first issue on appeal is that there was insufficient evidence to support either of his convictions. We disagree. When reviewing a claim of insufficient evidence, this Court must view the evidence de novo, in the light most favorable to the prosecutor, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

The elements of possession with intent to deliver cocaine are: (1) the recovered substance is cocaine, (2) the cocaine is in a mixture weighing less than 50 grams, (3) the defendant was not authorized to possess the substance, and (4) the defendant knowingly possessed cocaine with the intent to deliver. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, amended 441 Mich 1201 (1992); MCL 333.7401(2)(a)(iv). The elements of possession with intent to deliver marijuana are (1) the recovered substance is marijuana, (2) the marijuana is in a mixture weighing less than five kilograms, (3) the defendant was not authorized to possess the substance, and (4) the defendant knowingly possessed marijuana with the intent to deliver. *Wolfe, supra* at 516-517; MCL 333.7401(2)(d)(iii). With regard to both of the convictions, defendant only challenges the fourth element.

Sufficient evidence was presented to show that defendant both knowingly possessed the drugs and that he had the intent to deliver them. Proof of actual possession is not necessary and proof of constructive possession will be sufficient. *Wolfe, supra* at 519-520. Constructive possession requires that the defendant has the right to exercise control over the drugs and that he knows that they are present. *Id.* at 520. Possession, however, need not be exclusive to the defendant. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995).

In this case, the drugs were found in an open paper bag on the floorboard of the front passenger side of the car, where defendant was sitting. If defendant had still been sitting in the car, the bag would have been between his legs. A partially eaten hamburger was found with the drugs and defendant told the police he had been eating. While the rest of the car was filled with trash, the paper bag was the only thing on the floorboard of the front passenger side of the vehicle. Viewing that evidence in a light most favorable to the prosecution, we conclude that sufficient evidence was presented for the jury to find that defendant possessed the drugs.

In addition to knowingly possessing the drugs, defendant must also have had the intent to deliver them. Questions of intent should be left to the trier of fact to resolve. *Avant, supra* at 506. Moreover, considering the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient to infer intent. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

In this case, an expert witness testified that, in his opinion, the drugs found were for delivery rather than personal use. Defendant had cocaine in amounts that could easily be broken down into sale amounts. The marijuana was separated into four separate baggies. Defendant also had money on him separated into two pockets, which is typical of drug dealers who sell two types of drugs. While drugs were discovered, there was no drug use paraphernalia found. Defendant also stated to the police that he did not use cocaine. Deferring to the jury's superior position to judge witness credibility and viewing the evidence in a light most favorable to the prosecution, we conclude that sufficient evidence was presented to support the finding that defendant had an intent to deliver the drugs he possessed.

Defendant's second issue on appeal is that the expert testimony of Sergeant Harold Payer was improperly admitted. Defendant's only preserved argument is that Payer's expert testimony was mere speculation with regard to the currency found in defendant's pockets. Preserved evidentiary issues are reviewed for abuse of discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). Unpreserved, nonconstitutional issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. *Id.* at 763. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. The defendant bears the burden of persuasion with respect to prejudice. *Id.* at 763. Once a defendant satisfies the three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763-764.

Courts have generally allowed expert testimony to explain the significance of items seized and the circumstances of the investigation. *Murray, supra* at 53. This Court has also held that the prosecution may use expert testimony from police officers to aid the jury in understanding the evidence in controlled substance cases. *Id.* at 53; *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991). For such expert testimony to be admissible: “(1) the expert must be qualified; (2) the evidence must serve to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue; and (3) the evidence must be from a recognized discipline.” *Murray, supra* at 53, quoting *People v Williams (After Remand)*, 198 Mich App 537, 541; 499 NW2d 404 (1993).

In this case, two of the three requirements are clearly met. With regard to the first requirement, Payer’s training and experience qualified him as an expert witness. With regard to the third requirement, this Court has stated in the past, there is “no serious question that drug-related law enforcement is a recognized area of expertise.” *Williams supra* at 542.

The remaining requirement that must be met to admit the evidence is that the evidence serves to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue. The information testified to in this case was not within the layman’s common knowledge and was useful to the jury in determining defendant’s intent at the time he possessed the drugs. *Id.* On appeal, however, defendant argues that this requirement was not met because Payer’s testimony amounts to mere drug profiling. Drug profile evidence is essentially a compilation of otherwise innocuous characteristics that many drug dealers exhibit. *Murray, supra* at 52. Such evidence is “inherently prejudicial to the defendant because the profile may suggest that innocuous events indicate criminal activity.” *Id.* at 53, quoting *United States v Lim*, 984 F2d 331, 334-335 (CA 9, 1993). Drug profile evidence is generally inadmissible as substantive evidence of guilt because proof of crime based wholly on these characteristics could potentially convict innocent people. *Murray, supra* at 53.

While drug profile evidence is inadmissible as substantive proof, it may be used to help the jury understand the evidentiary background of the case and the modus operandi of drug dealers. *Id.* at 54-56. A variety of factors should be looked at in distinguishing between the appropriate and inappropriate use of drug profile evidence: (1) the reason given and accepted for the admission of the profile evidence must only be for a proper use; (2) the profile, without more, should not normally enable a jury to infer the defendant’s guilt; (3) because the focus is primarily on the jury’s use of the profile, courts must make clear what is and what is not an appropriate use of the evidence; and (4) the expert witness should not express his opinion, based on the profile, that the defendant is guilty, nor should he expressly compare the defendant’s characteristics to the profile in such a way that guilt is necessarily implied. *Id.* at 56-58.

The challenged evidence satisfies the four factors enunciated in *Murray*. First, the reason for the introduction, and the reason accepted for admission, were proper, i.e., to assist the jury as background for modus operandi. Second, the prosecution did not rely exclusively on profile evidence to convict defendant; rather, the prosecutor also introduced and argued additional evidence from which the jury could draw an inference of criminality. Third, although the trial court did not give a limiting instruction to the jury regarding the proper and limited use of profile evidence, no such instruction was requested by defendant and the court did give a general instruction on the proper use of expert testimony. Finally, the expert witness did not express his opinion, based on a profile, that defendant was guilty, and did not expressly compare defendant’s

characteristics to the profile in such a way that guilt was necessarily implied. While the witness did express the opinion that the drugs were for delivery rather than personal use, that opinion was based on the evidence introduced at trial and not on any profile. The fact that the testimony did embrace the ultimate issue of intent to deliver does not render the evidence inadmissible. *Ray, supra* at 708.

Assuming, arguendo, that at least some of the evidence was improperly admitted or used, we conclude that any error did not affect defendant's substantial rights. Other evidence showed defendant possessed cocaine and marijuana with the intent to deliver. The drugs were found on the floorboard of the front passenger seat of the car where defendant was sitting. The drugs were also found with partially eaten food and defendant told the police that he was eating before they arrested him. Two types of drugs were found in the bag, but there was no drug use paraphernalia. The marijuana was separated into four plastic baggies. Defendant told the police that he did not use cocaine. In light of this properly admitted evidence, we cannot conclude any wrongfully admitted evidence prejudiced defendant.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood